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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1108

JACK O. CHERTKOF,

Petitioner,

v.

HARRY C. WEISKITTEL CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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Table of Contents

	PAGE
JURISDICTION	1
QUESTION PRESENTED	2
MARYLAND RULE INVOLVED	2
COUNTER-STATEMENT	3
ARGUMENT:	
I. The alleged federal question was not properly presented	5
II. The writ should not be granted	
A. There is no conflict of decision	7
B. There is no important question of federal law	9
C. It is uncertain that the alleged federal question can be reached even if the court were to take this case	9
CONCLUSION	10

Table of Citations

Cases

Bailey v. Anderson, 326 U.S. 203, 66 S. Ct. 66 (1945)	6
Black v. Cutter Laboratories, 351 U.S. 292, 76 S. Ct. 824 (1956)	6
Edelman v. People of State of California, 344 U.S. 357, 73 S. Ct. 293 (1953)	5, 6
Estes v. State of Texas, 381 U.S. 532, 85 S. Ct. 1628 (1965)	8
Hulbert v. Chicago, 202 U.S. 275, 26 S. Ct. 617 (1906)	5
In Re Murchison, 349 U.S. 133, 75 S. Ct. 623 (1955)	7, 8
Kirkorian v. State, 233 Md. 324, 196 A. 2d 886, Cert. denied, 377 U.S. 945	5
McCall v. Warden, Maryland House of Correction, 3 Md. App. 188, 238 A. 2d 574 (1968)	10

PAGE

Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 23 S. Ct. 375 (1903) 6
Pacheco v. People of Puerto Rico, 300 F. 2d 759 (C.A. 1st 1962) 10
Sinahopoulas v. Villa, 92 N.J. 514, 224 A. 2d 140 (1966) 9
State v. Kohlfuss, 152 Conn. 625, 211 A. 2d 143 (1965) 10
State v. Lockridge, 6 Okla. Cr. 216, 118 P. 152 (1911) 9
Stembridge v. State of Georgia, 343 U.S. 541, 72 S. Ct. 834 (1952) 6
Stevenson v. Stevenson, 222 Ga. 47, 148 S.E. 2d 388 (1966) 9
Tumey v. State of Ohio, 273 U.S. 510, 47 S. Ct. 437 (1927) 8
United States v. Re, 372 F. 2d 641 (C.A. 2d 1967); Cert. denied, 388 U.S. 912 (1967) 9
Walters v. State, 242 Md. 235, 218 A. 2d 678 (1965) 5
Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660 (1944) 10

Statutes

28 U.S.C., Section 1257(3) 1

Rules of Court

Maryland Rules of Procedure, Rule 885 ..... 2, 6

Other Authorities

Annotation: "Judge's Comments — Urging Settlement" 6 A.L.R. 3d 1457 8

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JURISDICTION

The Petitioner invokes jurisdiction under 28 U.S.C., Section 1257 (3). The record, however, does not support such an invocation. Petitioner states that he specially set up or claimed one of his rights under the Constitution of the United States, but, there is nothing in the record to show that either Petitioner or his then lawyer, objected to the trial judge proceeding to hear the motion to enforce the settlement agreement. No motion to disqualify the trial judge was ever filed. These failures on the part of the Petitioner constitute, as the Court of Appeals of Maryland

found, an adequate state ground for its denial of relief. Moreover, although Petitioner attempted to raise the federal question for the first time on appeal, nowhere in the decision of the Court of Appeals of Maryland, does the Court specifically state that it is deciding the federal question.

QUESTION PRESENTED

Has the Petitioner been denied due process of law by a state judge's hearing and ruling on a motion to enforce an agreement to settle a civil suit, where such agreement was arrived at after the judge, at the request of all counsel, conferred alone with the parties and thereafter counsel for all parties dictated the terms of the settlement agreement into the record and where neither Petitioner nor his then counsel objected, nor moved to disqualify the judge from hearing the motion?

MARYLAND RULE INVOLVED

Vol. 9B Annotated Code of Maryland (1957) 1963 Replacement Volume:

> "Rule 885. Scope of Review — Limited to Questions Decided by Lower Court.
>
> This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction

of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court."

COUNTER-STATEMENT

During a jury trial of a civil action in a state court, it was suggested by the lawyers for both sides that the trial judge attempt to promote settlement and that he confer alone with the parties (E. 21, 30).* The lawyers were fully advised by the judge of what was transpiring from time to time during the negotiations and the parties were sent to confer at various times with their lawyers as the negotiations progressed (E. 21-22, 24, 26, 28-29, 30, 42). A settlement agreement was ultimately orally concluded (E. 42). Since it was late in the day, it was further agreed that there would be a meeting in the morning, when the terms of the settlement agreement would be dictated to the court reporter (E. 21, 42).

In the morning the lawyers for the parties appeared before the trial judge in his chambers (E. 22). The Petitioner's lawyer advised the Court that the Petitioner did not plan to attend but that he would like a copy of the transcript of the proceedings in open court and a copy of the settlement stipulation (E. 42). The Respondent's lawyer dictated to the reporter the terms of the agreement reached the day before (E. 22-24). The Petitioner's lawyer did not object to the terms of the agreement as dictated, nor did he indicate or suggest that what was dictated was not a complete and accurate expression of the agreement (E. 22-24). When the dictation ended, the trial judge convened in open court and advised the jury that an amicable disposition of the claim and counterclaim had been entered

* "E" refers to the Record Extract filed in the Court of Appeals of Maryland, part of the record (R. 2-66) certified by that court to this Court.

into by the parties and their counsel, ordered the withdrawal of a juror and declared a mistrial (E. 24).

In due time, the papers carrying out the settlement were forwarded to Petitioner's lawyer (E. 42-43). Petitioner then claimed, among other things, that he wanted, as the trial court later characterized it, an "apology" in the release in the following explicit form: "It is further acknowledged that the allegations contained in the counter-suit were without foundation" (E. 31, 43). The Respondent would not agree to this proposed change because it had not been agreed to, might expose it to new law suits and was a reflection on the parties and counsel who had filed the counterclaim against Petitioner (E. 31).

After tender on its part and several unsuccessful demands on the Petitioner for performance of his agreement, Respondent filed a motion for enforcement of the settlement agreement (E. 24-25, 43). A hearing on the motion was held before the trial judge at which Petitioner and his lawyer appeared (E. 24-25). The Petitioner's lawyer told the trial court that no answer to the motion would be filed but that he wanted the Petitioner to explain for himself why he felt he should not sign the settlement papers (E. 24-25). The trial court then heard from the Petitioner who amplified at some length concerning the lack of an "apology" in the release from the Respondent (E. 28-30). Counsel were heard and then the trial court asked Petitioner's counsel whether there was anything in the release to the Petitioner contrary to the understanding arrived at in the settlement agreement as transcribed, to which Petitioner's counsel replied that it was not contrary to his understanding but rather to his client's understanding (E. 33). At no time during this hearing did Petitioner or his lawyer let the trial judge know that they thought it unfair for him to decide the motion or move his disqualification

(E. 24-41). The trial court subsequently made formal findings of fact and conclusions of law and entered an order enforcing the settlement agreement (E. 48-51).

ARGUMENT

I.

The Federal Question Was Not Properly Presented.

The question of whether the trial judge should have referred the motion to enforce the settlement agreement to another judge was never raised in the trial court, nor was it initiated in any manner. In fact, the statements of Petitioner and his counsel may be examined with the utmost of care and nothing will be found which would infer or imply that Petitioner felt this procedure unfair.

Under Maryland practice a constitutional objection must be raised before the trial court. *Walters v. State*, 242 Md. 235, 218 A. 2d 678 (1965); *Kirkorian v. State*, 233 Md. 324, 196 A. 2d 866 (1963), cert. denied, 377 U.S. 945, and this court has long followed the rule that it is without power to decide whether constitutional rights have been violated where federal questions have not been seasonably raised in accordance with the requirements of state law. *Hulbert v. Chicago*, 202 U.S. 275, 26 S. Ct. 617 (1906); *Edelman v. People of State of California*, 344 U.S. 357, 73 S. Ct. 293 (1953). The failure of the Petitioner in this case to raise the issue in the trial court is within the ambit of those decisions and accordingly jurisdiction should be declined.

On appeal to the Court of Appeals of Maryland, new counsel for Petitioner, for the first time claimed that the trial judge, *sua sponte*, should have sent the matter to some other trier of facts for determination and urged that the trial judge's failure to do so deprived the Petitioner of due process under both the federal and Maryland Constitutions. The Court of Appeals of Maryland did not decide either

question. It merely said that it saw no reason why, as a matter of law, the trial judge was disqualified to act simply because he had a knowledge of what had previously happened in the case, a knowledge acquired in the course of his official judicial duties. It did not decide whether the trial judge's failure to refer the case to another judge was or was not violative of due process under either Constitution. Where the highest state court is silent on the federal question this court has declined jurisdiction on the assumption, unless it can be affirmatively shown otherwise, that the silence is due to the procedural deficiency. *Bailey v. Anderson,* 326 U.S. 203, 66 S. Ct. 66 (1945); *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 23 S. Ct. 375 (1903). Here, the record affirmatively shows the contrary; i.e., that the Maryland Court of Appeals relied on the procedural deficiency. That Court said (App. B. of Petition, p. 9):

> "If [Petitioner] had a wish or a right to have the issue he raised [whether he was bound by the settlement] tried by another finder of fact, he waived that wish or that right. * * * The effect of such a waiver is reflected in Maryland Rule 885, providing that a matter not raised or decided below will not ordinarily be considered on appeal." (Citation omitted.)

Finally, jurisdiction should not be taken for the reason that such noncompliance with local rules has been held by this court to be an adequate state ground for decision and therefore precludes this court's review of the judgment. *Edelman v. People of State of California, supra; Black v. Cutter Laboratories,* 351 U.S. 292, 76 S. Ct. 824 (1956); *Stembridge v. State of Georgia,* 343 U.S. 541, 72 S. Ct. 834 (1952).

There being no jurisdiction in this court, the petition for the writ should be dismissed.

II.

The Writ Should Not Be Granted.

A. *There Is No Conflict of Decision.*

Petitioner asserts a conflict in decisions as one of the bases for granting the Writ. He relies on *In Re Murchison,* 349 U.S. 133, 75 S. Ct. 623 (1955) to establish this conflict. This Court will recall that *Murchison* was a criminal contempt case involving Michigan's one-man (judge) grand jury system which combined in a single official, the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury. In that case this court held that the due process requirement of an impartial tribunal was not met where the same judge presiding at the contempt hearing had also served as the "one-man (judge) grand jury" out of which the contempt charges arose.

Petitioner claims this court declared in *Murchison* that personal knowledge of facts in issue will, without more, disqualify a judge. No such declaration appears in that decision. On the contrary, in that case, the pivotal conclusion is that a judge who is a part of the accusatory process cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those he has accused. The Court said (p. 137):

> "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

It is apparent from the above conclusion that it was not the fact that the judge had personal knowledge that caused the constitutional infirmity in *Murchison;* it was, on the contrary, the aggregate authority he had which in a criminal setting bespeaks probable abuse of constitutional dimension.

Further, one-man (judge) grand jury procedures and criminal prosecution arising therefrom should not be compared with a settlement conference administered by a judge during a civil trial at the request of counsel and a subsequent motion to enforce that agreement. In the settlement situation the judge has no direct, personal, substantial or pecuniary interest in reaching a conclusion against the petitioner, therefore, due process is not in jeopardy. Cf. *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927). The rule is well established that within proper bounds, a trial judge should encourage the settlement of litigated cases and he does not exceed proper boundaries in encouraging settlement unless a party can show his bias, hostility, duress or that he has prejudged the case. *Annotation: "Judge's Comments - Urging Settlement"*, 6 A.L.R. 3d 1457. None was shown here.

Murchison is also not applicable for the plain and simple reason that objection to the constitutional defect was timely made in that case while here it was not.

In sum, in *Murchison*, the trial judge was an accuser, a committing magistrate, a prosecutor and the trier of fact. In the present case, the trial judge merely administered a settlement at the request of all counsel and heard a motion to which no one objected. It is apparent that the procedures employed in the two cases are not comparable. In *Murchison*, one is forced to conclude that the trial judge could not be wholly disinterested in the outcome of the trial, that is, that the procedure employed by the State, was so pregnant with probable prejudice, it was inherently lacking in due process. *Estes v. State of Texas*, 381 U.S. 532, 542, 85 S. Ct. 1628, 1633 (1965). In the civil trial settlement situation one is not required to conclude that because the judge administered the settlement agreement he could not be wholly disinterested in the outcome of the motion.

B. *There Is No Important Question of Federal Law.*

The alleged federal question raised by Petitioner is not important. First, it is based on an incorrect premise; i.e., that under our law the trier of facts is ordinarily disqualified by personal knowledge. This is not the law and the prior knowledge only has relevance as to any bias or prejudice on the part of the trier of fact. *Stevenson v. Stevenson,* 222 Ga. 47, 148 S.E. 2d 388 (1966); *Sinahopoulas v. Villa,* 92 N.J. 514, 224 A. 2d 140 (1966); *State v. Lockridge,* 6 Okla. Cr. 216, 118 P. 152 (1911). See also: *United States v. Re,* 372 F. 2d 641 (C.A. 2d 1967), cert. denied, 388 U.S. 912. Second, the decision obviously turns on its own facts and will therefore affect few persons other than the litigants themselves. Any decision would have to be limited to a court administered settlement which breaks down because of a dispute as to one of the terms of the settlement and a subsequent motion upon which a hearing is held before the same trial judge and the complaining party fails to let the trial judge know that he thinks that it is unfair for him to decide the motion.

C. *It Is Uncertain That the Alleged Federal Question Can Be Reached Even if the Court Were To Take This Case.*

Even if this Court were to accept this case, it would have to go behind the Maryland Court of Appeals finding as to waiver and depending on the outcome of that review, only then could it reach the alleged federal question. While the Respondent is aware that this court has the authority to go behind the factual finding of a state court when said finding involves a constitutional right, it is clear that even if the court were to do this it would be forced to conclude that the Court of Appeals of Maryland is correct on the waiver point. The record clearly reveals "* * * that [Petitioner] knowingly and voluntarily with full knowl-

edge of all pertinent facts submitted to [the trial judge] the determination of his claim * * *". (App. B of Petition, p. 8). *Yakus v. United States*, 321 U.S. 414, 64 S. Ct. 660 (1944); *Pacheco v. People of Puerto Rico*, 300 F. 2d 759 (C.A. 1st 1962); *McCall v. Warden, Maryland House of Correction*, 3 Md. App. 188, 238 A. 2d 574 (1968); *State v. Kohlfuss*, 152 Conn. 625, 211 A. 2d 143 (1965).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be dismissed or denied.

Respectfully submitted,

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